No. 16072

United States
Court of Appeals
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY, a corporation, Appellant,

vs.

NORTHWEST CASUALTY COMPANY, a corporation, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—8-27-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

WHEELOCK, RICHARDSON & NIEHAUS,
C. R. RICHARDSON,
Corbett Building,
Portland 4, Oregon,

For Appellant.

PHILLIPS & SANDEBERG,
WM. C. RALSTON,
W. K. PHILLIPS,
Public Service Building,
Portland 4, Oregon,

LEO LEVENSON,
314 Portland Trust Building,
Portland 4, Oregon,

For Appellee.

In The Circuit Court of the State of Oregon
For The County of Multnomah

No. 239,354

TIDEWATER ASSOCIATED OIL COMPANY, a Delaware corporation, Plaintiff,

vs.

NORTHWEST CASUALTY COMPANY, a Washington corporation, Defendant.

COMPLAINT

Plaintiff complains, and for cause of action against the defendant, alleges:

I.

That at all times herein mentioned, Tidewater Associated Oil Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware and licensed to carry on a gasoline and oil distributing business within the State of Oregon. That at all times herein mentioned Northwest Casualty Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington and licensed to carry on a general insurance business within the State of Oregon.

II.

That on or about the 9th day of January, 1953, defendant, Northwest Casualty Company of Seattle, Washington, in consideration of a premium

and policy fee in the sum of $174.04, wrote, issued and delivered a certain comprehensive public liability Policy No. 880-7277, wherein Plaintiff was an additional named insured and wherein defendant agreed to pay on behalf of insured all sums which Plaintiff would be obligated to pay by reason of liability imposed upon Plaintiff by law for damages because of bodily injury not to exceed $25,000.00 for each person and $50,000.00 for each occurrence. That said policy was in full force and effect at all times herein mentioned.

III.

That on the 12th day of September, 1955, there was served upon Plaintiff a summons and complaint entitled "Ruth Buffington, Plaintiff, vs. Wm. V. Sherer, Frank Moore, Jr., and Tidewater Associated Oil Company, a corporation, Defendants", being Case No. 19175 in the Circuit Court of the State of Oregon in and for the County of Coos, copy of which is attached hereto, marked Exhibit A. and by this reference made a part and parcel hereof.

IV.

That on or about January 25, 1956, Plaintiff by letter tendered the defense of said action to defendant under and in accordance with the terms of said policy of insurance hereinabove referred. That in reply to said letter, defendant, by letter dated January 27, 1956, denied liability under said policy, which said letter is attached hereto, marked Exhibit B and by this reference made a part and

parcel hereof. That by reason thereof, Plaintiff was required to, and did procure counsel to defend said action, and because of plaintiff's inability to defend under the acts of negligence set forth in said complaint, on advice of counsel did fully compromise and settle said action on the 28th day of June, 1956, by paying to the Plaintiff therein, Ruth Buffington and her husband, Robert Buffington, the full sum of $15,000.00 which Plaintiff herein alleges to be a reasonable, fair and necessary sum for the settlement thereof.

V.

That by reason of the refusal of defendant to accept liability in accordance with the terms of said policy, plaintiff has been damaged in the sum of $15,000.00.

VI.

That more than six months has elapsed since the date of the tender of said above mentioned action to defendant and a reasonable attorney's fee to be allowed herein would be the sum of $3,500.00.

For a Second Cause of Action, Plaintiff alleges:

I.

Realleges Paragraphs I, II and III of its first cause of action and by this reference incorporates the same herein as though fully set forth hereinafter.

II.

That on or about January 25, 1956, plaintiff, by letter, tendered to defendant the defense of said

action hereinabove referred in accordance with the terms of said policy of insurance referred to above. That in reply to said letter defendant, by letter dated January 27, 1956, attached hereto marked Exhibit B and by this reference made a part and parcel hereof, refused to defend said action. That by reason thereof, plaintiff was required to, and did, procure counsel to defend said action and plaintiff was obligated to, and did, pay all costs incurred in said action amounting to $260.73, together with a reasonable fee for its attorneys in the sum of $750.00, to plaintiff's damage in the sum of $1010.73.

III.

That more than six months has elapsed since the date of this tender of said above mentioned action to defend and a reasonable attorney's fee to be allowed herein would be the sum of $700.00.

Wherefore, Plaintiff prays for judgment against defendant in the sum of $15,000.00 on its first cause of action, together with the sum of $3500.00 as and for a reasonable attorney's fee herein; and on its second cause of action, for the sum of $1010.73, together with the sum of $700.00 as and for a reasonable attorney's fee herein: together with Plaintiff's costs and disbursements in this cause incurred.

WHEELOCK & RICHARDSON,
Attorneys for Plaintiff.

EXHIBIT "A"

In The Circuit Court of the State of Oregon
In and For The County of Coos.

Case No. 19175

RUTH BUFFINGTON, Plaintiff,

vs.

WM. V. SHERER, FRANK MOORE, JR., and TIDE WATER ASSOCIATED OIL COMPANY, a corporation, Defendants.

Action at Law

COMPLAINT

Comes now the Plaintiff above named and for her first cause of action against the Defendants above named complains and alleges as follows:

I.

That the Defendant Tide Water Associated Oil Company is a corporation duly organized and existing under the laws of the State of Delaware, and licensed to do business in the State of Oregon.

II.

That at all times in this Complaint mentioned, the Defendants were engaged in the sale, delivery, and distribution of gasoline, stove oil and other petroleum products in Bandon, Coos County, Oregon, and the vicinity thereof.

Exhibit "A"—(Continued)

III.

That at all times in Plaintiff's Complaint mentioned, the Defendants Wm. V. Sherer and Frank Moore, Jr., were the agents, servants and employes of the Defendant Tide Water Associated Oil Company, a corporation, and at all times in this Complaint mentioned were acting within the due course and scope of their employment as such agents, servants and employes.

IV.

That on or about the 3rd day of December, 1953, and for some time prior thereto, Plaintiff, together with her husband and three children, maintained a residence near Bandon in Coos County, Oregon, and as a part of the furnishings in said home had installed and in use therein an oil heating stove for the living room area of said house, and a wood cooking stove for cooking purposes located in the kitchen of said house; that in order to furnish fuel to said oil heating stove a small pipe ran from said heating stove to a tank located outside said house in which stove oil was stored, and which stove oil ran from said tank into the said heating stove when required to maintain a fire therein.

V.

That as a part of Plaintiff's normal and regular household duties she was required to start a fire in the kitchen stove heretofore mentioned, and in connection therewith kept a can for the sole and ex-

Exhibit "A"—(Continued)

clusive purpose of keeping therein a small quantity of stove oil, a small amount of which stove oil Plaintiff would pour upon the stove wood located in the fire box of said stove to facilitate the starting of a fire therein.

VI.

That on or about the 1st day of December, 1953, an order was placed with the Defendant Tide Water Associated Oil Company for the delivery to the Plaintiff's home, stove oil of the kind normally and usually used in an oil heating stove, and with a flash point of approximately 150° Fahrenheit; that on or about the 2nd day of December, 1953, Defendant Frank Moore, Jr., drove to Plaintiff's home for the purpose of delivering thereto stove oil as had been previously ordered from the Defendant Tide Water Associated Oil Company; that the truck in which said stove oil was delivered had attached thereto as a part thereof a tank divided into compartments; one such compartment contained stove oil; other compartments of said tank contained highly explosive and inflammable petroleum products normally and customarily termed regular gasoline and ethyl gasoline.

VII.

That upon the arrival of said Defendant Frank Moore, Jr., Plaintiff obtained the can heretofore mentioned and requested said Defendant Frank Moore, Jr., to place a small quantity of stove oil, as ordered, therein, and that she desired to use

Exhibit "A"—(Continued)

the same to facilitate the starting of kitchen stove fires. Thereupon, said Defendants took the hose located upon said truck and poured a petroleum product represented by said Defendants to be stove oil, as ordered, in said can. Thereupon, Plaintiff placed said can and said contents as placed therein by Defendants, upon the back porch of her home for later use in starting kitchen stove fires.

VIII.

That on or about the hour of 8:00 o'clock A.M. on the 3rd day of December, 1953, the Plaintiff was required to start a fire in the wood stove hereinbefore mentioned, placed some wood therein, obtained the can which contained only the petroleum product delivered by Defendants as hereinbefore mentioned, and which Plaintiff had placed on the back porch, and which had been represented to her as containing stove oil, struck a match and placed the same beneath the wood at the end of the fire box farthest from the front of the stove, and commenced to pour a small quantity of the petroleum product from said can upon the wood at the front end of the fire box of the stove; that simultaneously, with the first small particle of the petroleum product coming in contact with the wood at the front end of the fire box of said stove, the petroleum product from said can ignited and flamed with great force and violence, and the flame therefrom simultaneously travelled up and into the can held by the Plaintiff thereupon, the contents of the can

Exhibit "A"—(Continued)

which had been delivered by Defendants and represented as stove oil, exploded with great force and violence, the force of said explosion propelling said can against Plaintiff's chest and the impact therefrom hurled the Plaintiff backwards for several feet and knocked her to the kitchen floor; and thereupon, fire from the petroleum product in said can, and which had been delivered by Defendants and represented as stove oil, almost completely enveloped Plaintiff with great fury and with intense heat, and thereby causing Plaintiff to be severely burned and to sustain injuries as hereinbefore set forth.

IX.

That Plaintiff's injuries heretofore mentioned and as hereinafter set forth were proximately caused by the carelessness and negligence of the Defendants, in the following particulars, to-wit:

(a) In furnishing to Plaintiff a petroleum product other than stove oil, or in furnishing another petroleum product mixed with stove oil, either of which when used for the purpose for which the Defendants knew it was going to be used, was highly explosive and would ignite with great fury and violence, was extremely dangerous and under no circumstances adaptable for the use for which Plaintiff desired said petroleum product, all of which was known to the Defendants, or with reasonable care and caution should have been known to the Defendants.

(b) That Defendants pumped from the only hose

Exhibit "A"—(Continued)

located on the truck used in the delivery of said petroleum product and into plaintiff's can a petroleum product which Defendants represented to be stove oil, when Defendants had immediately prior thereto pumped through the same hose gasoline, and when said Defendants knew, or in the exercise of reasonable care should have known, that said hose still contained gasoline and that said gasoline would be the first petroleum product to go into said can from said hose, and when used for the purpose for which Plaintiff intended to use the same, whether entirely gasoline or a mixture of gasoline and stove oil would constitute a highly explosive and dangerous material not suited or intended for the use contemplated by Plaintiff, and likely to cause serious injury to Plaintiff.

(c) In failing to pump a sufficient quantity of petroleum product into the stove oil storage tank, thereby removing all trace of gasoline from said hose, and thereby eliminating the possibility that said hose contained any gasoline prior to placing any stove oil in the can for Plaintiff.

(d) In failing to have and maintain upon said truck a separate hose to be used exclusively for stove oil, and thereby preventing a highly combustible, explosive, inflammable and dangerous product such as gasoline, or a highly combustible, explosive, inflammable and dangerous product such as a mixture of gasoline and stove oil, being delivered to a person for the purpose of facilitating the starting of kitchen stove fires, and particularly,

Exhibit "A"—(Continued)

to this Plaintiff when the same was represented to her to be entirely stove oil.

X.

That as a proximate result of the negligence of the Defendants as hereinbefore alleged, Plaintiff sustained third degree burns to her right hand, right forearm, posterior aspects of the waist, buttocks, thighs and legs, which required that Plaintiff be confined in a hospital from the 3rd day of December, 1953, continuously until the 3rd day of April, 1954; that Plaintiff has suffered great pain and mental anguish as a result of said injuries; that Plaintiff was required to receive frequent blood transfusions, as well as intravenous plasma and serum albumen; that during the time of Plaintiff's hospitalization she was required to undergo four separate skin grafting operations to cover the burned area; that by reason of said burns she has a kaloid formation over the right hip, right groin and on the dorsum of the right hand and wrist; that Plaintiff will be required to undergo further reconstructive surgery on her right hand to alleviate the limited motion thereof by reason of said burns; that Plaintiff has sustained a permanent limitation of the movement of the right hand and wrist and a weakening condition of the right hand, which will prevent her from having a normal use thereof. The scarring of the Plaintiff's body by said burns in the areas heretofore described are permanent and Plaintiff will be severely scarred

Exhibit "A"—(Continued)

for the remainder of her life; that by reason of said injuries Plaintiff has been generally damaged in the sum of $100,000.00.

XI.

That as a proximate result of the negligence of the Defendants and the resulting injuries as hereinbefore alleged by Plaintiff, Plaintiff has incurred hospital bills in the sum of $3,199.00 and doctor bills in the sum of $600.00.

Plaintiff, for her second cause of action against Defendants complains and alleges as follows:

I.

Re-alleges Paragraphs numbered I, II, III, IV, and V of Plaintiff's first cause of action, as if specifically set forth herein.

II.

That upon the arrival of the Defendant Frank Moore, Jr. Plaintiff obtained the can heretofore mentioned and advised said Defendants that she required a small portion of the stove oil purchased for the purpose of facilitating the starting of kitchen stove fire, and thereupon, said Defendants took the hose located upon said truck, poured into said can the petroleum product which was represented by the said Defendants to be stove oil, and with a flash point of approximately 150° Fahrenheit; thereupon, Plaintiff placed said can and con-

Exhibit "A"—(Continued)

tents upon the back porch of her home, for later use for starting kitchen stove fires.

III.

That at the time of the purchase of the petroleum product, a portion of which was placed in the can at the request of the Plaintiff, the Defendants represented and impliedly warranted that the product placed in said can was stove oil, and was fit, safe and proper for the use which Plaintiff intended to employ said petroleum product, and Plaintiff relied upon the implied warranty of the Defendants that the said petroleum product was stove oil and that it was fit for the purpose for which she intended to employ the same, and had no notice that it was otherwise: however, at or about the hour of 8:00 o'clock A.M. on the 3rd day of December, 1953, Plaintiff was required to start a fire in the wood stove heretofore mentioned, placed some wood therein, obtained the can containing the same contents heretofore mentioned, from the back porch, which she believed and which had been represented to her as containing stove oil, and which Defendants impliedly warranted was safe and fit for the use to which she intended to employ it, struck a match and placed the same beneath the wood within and at one end of the fire box of the said kitchen stove, and commenced to pour a small quantity of the said petroleum product from said can upon the wood at the other end of said fire box; that simultaneously, with the first small par-

Exhibit "A"—(Continued)

ticle of the petroleum product from the said can coming into contact with the said wood, the petroleum product from said can ignited and flamed with great force and violence, and the flame therefrom instantaneously traveled up and into the can held by Plaintiff, thereupon, a violent explosion occurred and said can was thrown with great force and violence by said explosion against Plaintiff's chest, the impact therefrom hurling Plaintiff backwards for several feet and knocking her to the kitchen floor; thereupon, fire from the petroleum product in said can almost completely enveloped the Plaintiff with great fury and with intense heat, thereby causing Plaintiff to be severely burned and to sustain the injuries hereinafter set forth.

IV.

That the petroleum product sold by Defendants a portion of which was delivered into the can at the request of Plaintiff, and which Defendants impliedly warranted to be stove oil and safe and fit for the use for which Plaintiff intended to employ said petroleum product, was not stove oil, but gasoline, or a mixture of gasoline and stove oil, extremely dangerous, highly explosive and under no circumstances fit for or adaptable to the use for which Plaintiff desired to use the same, all of which was known to the Defendants, or with reasonable care and caution should have been known to the Defendants.

Exhibit "A"—(Continued)

V.

That by reason of the facts as heretofore alleged, the implied warranty to Plaintiff by Defendants was breached, and as a result thereof Plaintiff sustained third degree burns to her right hand, right forearm, posterior aspects of the waist, buttocks, thighs and legs, which required that Plaintiff be confined in a hospital from the 3rd day of December, 1953, continuously until the 3rd day of April, 1954; that Plaintiff has suffered great pain and mental anguish as a result of said injuries; that Plaintiff has required to receive frequent blood transfusions, as well as intravenous plasma and serum albumen; that during the time of Plaintiff's hospitalization, she was required to undergo four separate skin grafting operations to cover the burned area; that by reason of said burns, she has a keloid formation upon the right hip, right groin and upon the dorsum of the right hand and wrist, that Plaintiff will be required to undergo further reconstructive surgery on the right hand to alleviate the limited motion thereof by reason of said burns; that Plaintiff has sustained a permanent weakness and a permanent limitation of the movement of the right hand and wrist and the scarring of Plaintiff's body by said burns in the areas heretofore described are permanent and Plaintiff will be severely scarred for the remainder of her life, all to Plaintiff's damage in the amount of $100,000.00.

Exhibit "A"—(Continued)

VI.

That by reason of the facts heretofore alleged, the implied warranty of the Defendants to Plaintiff was breached, and as a result thereof Plaintiff has incurred hospital bills in the sum of $3,199.00, and doctor bills to date in the sum of $600.00 all to Plaintiff's damage in the further sum of $3,799.00.

Wherefore, Plaintiff demands judgment against the Defendants, and each of them, in the sum of $100,000.00 general damages and the further sum of $3,799.00, special damages, and for Plaintiff's costs and disbursements incurred herein.

BEDINGFIELD, GRANT &
BEDINGFIELD,
By D. J. GRANT, JR.,
Of Attorneys for Plaintiff.

[Title of Circuit Court and Cause.]

SUMMONS

To: Wm. V. Sherer, Frank Moore, Jr. and Tide Water Associated Oil Company, a corporation,

In the Name of the State of Oregon: You are hereby required to appear and answer the Complaint filed against you in the above entitled action within ten days from the date of service of this summons upon you, if served within this county; or if served within any other County of this State,

Exhibit "A"—(Continued)

then within twenty days from the date of the service of this Summons upon you; or if served outside the State of Oregon but within the United States, then within four weeks from the date of the service of this Summons upon you; or if served outside of the United States and within a territory of the United States then within six weeks from the date of the service of this Summons upon you and if you fail so to answer, for want thereof the Plaintiff will take judgment against you in the sum of $100,000.00 general damages and the further sum of $3,799.00 special damages.

BEDINGFIELD, GRANT &
BEDINGFIELD,
By D. J. GRANT,
Attorneys for Plaintiff.

EXHIBIT "B"

Airmail (Copy)

Northwestern Mutual Insurance Company
Incorporated 1901
Seattle, Washington

January 27, 1956

Oregon Claim Department, 234 Pacific Building, Portland, Oregon, CA. 8-9554. F. H. Stuckrath, Manager.

Tide Water Associated Oil Company
79 New Montgomery Street
San Francisco 20, California

Att: Mr. A. D. Williams

Re: Policy #880-7277, William V. Sherer, Insured. Loss 12/3/53. Your file: 1.10-Bandon.

Gentlemen:

This will acknowledge receipt of your airmail letter dated January 25th.

In your letter you state the Tide Water Associated Oil Company is a named insured under the above policy, and since suit has been filed against your company, you are tendering the defense of the action to us, because you state our policy provides the primary coverage.

It is true that your company is named as an additional insured under the above policy in so far as your interest is concerned in the operation of Wm. V. Sherer. However, attached to the policy is an Exclusion of Product Liability Endorsement, and because of this endorsement, we have already denied coverage to Mr. Sherer. For the same reason, this letter will be notice to you that our coverage does not apply to this case, and for this reason, Northwest Casualty Company is not in a position to defend the action which has been brought against your company.

Yours very truly,

PORTLAND CLAIM
DEPARTMENT,
/s/ FLOYD H. STUCKRATH,
Floyd H. Stuckrath, Manager.

FHS:cm
cc: Home Office Claim Dept.

In the District Court of the United States
for the District of Oregon

Civil No. 9168

TIDEWATER ASSOCIATED OIL COMPANY, a Delaware corporation, Plaintiff,

vs.

NORTHWEST CASUALTY COMPANY, a Washington corporation, Defendant.

ANSWER

Comes now the defendant Northwestern Mutual Insurance Company and for answer to the complaint of the plaintiff, admits, denies and alleges as follows:

First Defense

I.

Answering the allegations of the first cause of action, this defendant admits Paragraphs I and III.

II.

Admits that on or about the 9th day of January, 1953, the defendant issued and delivered a comprehensive policy No. 880-7277, but denies the remainder of Paragraph II.

III.

Admits that on or about January 25, 1956, plaintiff tendered the defense in the Buffington case to the defendant and that by letter dated January

27, 1956, the defendant denied liability under the policy, but denies the remaining allegations in Paragraph IV.

IV.

Denies Paragraph V and VI.

Second Defense

I.

Answering the allegations in the second cause of action, defendant admits and denies the allegations of Paragraph I in the manner in which they have been admitted and denied in the first defense.

II.

Admits that on or about January 25, 1956, the plaintiff tendered the defense of the Buffington action to the defendant, and that on January 27, 1956, by letter, the defendant refused to defend said action, but denies the remaining allegations in said paragraph II.

III.

Denies the allegations of Paragraph III.

Third Defense

I.

Defendant moves for an order dismissing the within cause of action on the ground that the court lacks jurisdiction over the subject matter for the reason that the summons heretofore served on the defendant does not comply with the requirements of O.R.S. 15.050.

Fourth Defense

I.

That accompanying the Policy of Insurance No. 880-7277 issued by the defendant and as a part of said policy, and qualifying the provisions thereof, is a duly executed rider in the following language:

"Exclusion of Product Liability

Exclusions (A) and (B) below are applicable only when checked.

X (A) Bodily Injury

It is agreed that the policy does not apply to bodily injury, sickness or disease, including death at any time resulting therefrom.

X (B) Property Damage

It is agreed that the policy does not apply to injury to or destruction of property (including loss of use of such property):

if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence (other than pick up and delivery, and the existence of tools, uninstalled equipment, and abandoned or unused material); provided, operations shall not be deemed incomplete because improperly or defectively performed

or because further operations may be required pursuant to a service or maintenance agreement.

Subject, otherwise, to all the terms and conditions of the policy.

Attached to and hereby made a part of policy No. ..... of the Northwest Casualty Company, of Seattle, Washington."

II.

That by reason of the foregoing rider and exclusion, no responsibility nor liability arose against the defendant by reason of the accident of December 3rd, 1953, and any expense of settlement incurred thereby.

Fifth Defense

I.

That if the plaintiff, or any one acting for it, made a settlement payment of $15,000.00, it was done without knowledge, consent nor liability on the part of the defendant and was purely a volunteer payment for which the defendant is not liable.

Sixth Defense

I.

If the plaintiff incurred any attorney's fees or made other expenditures in defending or settling the claim arising out of the accident of December 3, 1953, such expenditure or charges were incurred by the plaintiff on its own volition and the defendant is not liable therefor.

Wherefore, having fully answered, the defendant prays for an order of this Court dismissing the complaint of the plaintiff and for its costs and disbursements.

/s/ WM. C. RALSTON,
Of Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 17, 1957.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above entitled cause came on regularly for pre-trial conference before the undersigned Judge of the above entitled Court on December 16, 1957. Plaintiff appeared by C. E. Wheelock, of its attorneys, and the Defendant appeared by William C. Ralston, of its attorneys. The parties, with the approval of the Court, agreed upon the following:

Statement of Facts Pertaining to First and Second Cause of Action

I.

That the above entitled action was commenced in the Circuit Court of the State of Oregon for the County of Multnomah, the title being the same and the case number in said Court being 239-354. That upon being served, Defendant filed a petition for removal of said case, together with a removal bond, copy of complaint, copy of summons and answer

attached thereto, all properly verified; that Plaintiff has not and will not object to said removal.

II.

Plaintiff is a citizen of the State of Delaware. Defendant is a citizen of the State of Washington. The amount in controversy, exclusive of interest and costs, exceeds the amount of $3,000.00.

III.

Plaintiff is and at all times herein mentioned, was duly licensed to carry on a gasoline and oil distributing business within the State of Oregon, and Defendant is and at all times mentioned herein, was licensed to carry on a general insurance business within the State of Oregon.

IV.

Defendant, on or about the 9th day of January, 1953, issued and delivered a Comprehensive Public Liability policy bearing its No. 880-7277, to Wm. V. Sherer, to which there was attached a rider entitled, "Exclusion of Product Liability", and that Plaintiff was an additional named insured in said policy and that the limits of said policy were $25,000.00 for each person, and $50,000.00 for each occurrence as to bodily injury. That said policy was in full force and effect on December 3, 1953.

V.

That on the 12th day of September, 1955, there was served upon Plaintiff a summons and complaint, entitled, "Ruth Buffington, Plaintiff, vs.

Wm. V. Sherer, Frank Moore, Jr. and Tidewater Associated Oil Company, a corporation, Defendants", being case No. 19175 in the Circuit Court of the State of Oregon in and for the County of Coos.

VI.

Plaintiff, on or about January 25, 1956, tendered the defense of the above entitled case hereinafter referred to as the "Buffington Case" to the Defendant and that Defendant, by letter dated January 27, 1956, denied any liability under the terms of said policy.

VII.

That thereafter Plaintiff procured counsel, proceeded to defend said action and did settle the same by paying to Ruth Buffington and Robert Buffington, her husband, the sum of $15,000.00 in full settlement therefor.

Plaintiff's Contentions As To Plaintiff's First Cause of Action

I.

Plaintiff contends that the payment of the sum of $15,000.00 to Ruth Buffington and Robert Buffington, her husband, in full settlement of the Buffington case was a fair and reasonable sum to be paid in the settlement thereof.

II.

Plaintiff contends that the action as brought by Ruth Buffington, known as the Buffington Case,

is subject to an action to which Plaintiff was afforded protection under the insuring agreements of the policy of insurance, No. 880-7277 issued by Defendant and that Defendant breached this contract of insurance with Plaintiff when it refused to accept coverage thereunder to Plaintiff's damage in the sum of $15,000.00.

III.

Plaintiff contends that in addition to damages of $15,000.00, it is entitled to a reasonable attorneys fee herein. That more than six months have elapsed since the tender of the Buffington Case to the Defendant, and that a reasonable attorneys fee would be the sum of $3500.00.

Plaintiff's Contentions As To Plaintiff's Second Cause of Action

I.

Plaintiff contends that the Comprehensive Public Liability policy issued by Defendant, as hereinabove described, provides that Defendant shall defend any suit brought against the Plaintiff covered by the insuring agreements of said policy, and that Defendant in refusing to defend Plaintiff, after Plaintiff tendered to Defendant the defense of the Buffington Case, did procure counsel to defend said action and did incur and pay an attorneys fee of $750.00, which was a reasonable fee therefor and did incur and pay costs amounting to $260.73, all of which was necessarily incurred in the

defense of said action, to Plaintiff's further damage in the sum of $1,010.73.

II.

Plaintiff contends that in addition to being damaged in the sum of $1,010.73, Plaintiff is entitled to a reasonable attorneys fee herein. That more than six months have elapsed since the date of the tender of the said above mentioned Buffington Case to Defendant, and that a reasonable attorneys fee to be allowed in this second cause of action would be the sum of $700.00.

Defendant's Contentions As To Plaintiff's First and Second Causes of Action

The Defendant denies the foregoing contentions of the Plaintiff and further contends:

I.

The "Exclusion of Product Liability" rider attached to the liability policy No. 880-7277 excluded any coverage to the named insured for injury or destruction involved in or arising out of the accident occurring on or about December 3rd, 1953.

II.

The Defendant contends that it is not liable for attorneys fees incurred or alleged to have been incurred by the Plaintiff.

III.

The Defendant contends that it was under no obligation to defend any action brought against the

Plaintiff arising out of the accident of December 3rd, 1953.

IV.

That the Plaintiff is bound by the "Exclusion of Product Liability" rider attached to and made a part of Policy No. 880-7277 which reads as follows:

"Exclusion of Product Liability

Exclusions (A) and (B) below are applicable only when checked.

X (A) Bodily Injury

It is agreed that the policy does not apply to bodily injury, sickness or disease, including death at any time resulting therefrom.

X (B) Property Damage

injury to or destruction of property (including loss of use of such property): if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from the premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence (other than pick up and delivery, and the existence of tools, uninstalled equipment, and abandoned or unused material); provided, operations shall not be deemed incomplete because improperly or defectively performed

or because further operations may be required pursuant to a service or maintenance agreement.

Subject, otherwise, to all the terms and conditions of the policy.

Attached to and hereby made a part of policy No. ..... of the Northwest Casualty Company, of Seattle, Washington."

V.

That the settlement of $15,000.00, made by Plaintiff in the Buffington case, was done without the knowledge, consent or liability on the part of the Defendant and was purely a volunteer payment for which the Defendant is not liable.

VI.

That the Defendant was under no responsibility or liability for any claim, claims, expenditures or attorneys fees incurred or presented to the Plaintiff as a result of the accident of December 3, 1953.

Plaintiff denies Defendant's contentions.

Issues To Be Determined

I.

Did the policy of insurance entitled, "Comprehensive Public Liability policy No. 880-7277, issued by Defendant on or about the 9th day of January, 1953, together with the Exclusion of Product Liability endorsement attached thereto afford cover-

age thereunder to Plaintiff as against the liability as set forth in the Buffington case?

II.

Was the sum of $15,000.00 paid by Plaintiff in settlement of the Buffington case a reasonable sum therefor?

III.

Was the sum of $750.00, attorneys fees, and $260.73, costs incurred by Plaintiff in the defense and settlement of the Buffington case, and if so, was it reasonable expense incurred in the defense and settlement thereof?

IV.

Have more than six months elapsed since the tender of the Buffington case by Plaintiff to Defendant, and if so, is the sum of $3500.00 a reasonable attorneys fee to be allowed in Plaintiff's first cause of action herein, and the sum of $700.00 a reasonable attorneys fee herein to be allowed Plaintiff in Plaintiff's second cause of action?

V.

Is the Defendant liable for the payment of any attorneys fee, and if so, in what amount?

Physical Exhibits

Certain physical exhibits have been received as pre-trial exhibits. The parties agreeing, with the approval of the Court, that no further identifica-

tion of the exhibits is necessary, and that photostatic copies may be marked and used in lieu of the originals. In the event that said exhibits, or any part thereof, shall be offered in evidence at the time of trial, said exhibits are to be subject to objections only on the ground of relevancy, competency and materiality.

Plaintiff's Exhibits

1. Release dated June 28, 1956, by and between Ruth Buffington and Robert Buffington, her husband and Tidewater Associated Oil Company, a corporation, Frank Moore, Jr. and Wm. V. Sherer.

2. Stipulation of dismissal in the case entitled, "Ruth Buffington, Plaintiff, vs. Wm. V. Sherer, Frank Moore, Jr. and Tidewater Associated Oil Company, a corporation, Defendants", being case No. 19175 in the Circuit Court of the State of Oregon in and for the County of Coos entered into in June, 1956, by and between D. J. Grant of attorneys for Plaintiff, and Andrew W. Newhouse, of attorneys for Defendant.

3. Photostatic copy of policy, Comprehensive Public Liability, No. 880-7277 of the Northwest Casualty Company issued December 24, 1952, together with riders attached thereto naming as insured Wm. V. Sherer and as additional insured, Tidewater Associated Oil Company.

4. Letter of Northwest Mutual Insurance Company of Seattle, Washington, dated January 27, 1956, addressed to Tidewater Associated Oil Company re policy No. 880-7277.

5. Loan agreement by and between Continental Casualty Company, a corporation and Tidewater Oil Company, a corporation.

6. Letter dated April 23, 1956, from Andrew J. Newhouse to Continental Casualty Company re Buffington case.

7. Letter dated June 29, 1956, from A. J. Newhouse to Continental Casualty Company re Buffington case.

8. Statement dated July 25, 1956, from McKeown, Newhouse & Johnson to Continental Casualty Company re cost in Buffington case.

9. Photostatic copy of complaint and summons in case entitled, "Ruth Buffington, Plaintiff, vs. Wm. V. Sherer, Frank Moore, Jr. and Tidewater Associated Oil Company, a corporation, Defendants, being case No. 19175 in the Circuit Court of the State of Oregon in and for the County of Coos.

10. Endorsement for insurance policy entitled, "Erroneous Delivery of Fluids or Semi-Fluids".

Defendant's Exhibits

1. Statement of William V. Sherer dated May 27, 1954.

2. Statements of Frank L. Moore, Jr. dated May 28, 1954 and June 2, 1954.

3. Letter from Northwest Casualty Company to William V. Sherer, dated June 9, 1954.

4. Statement of Jay Hess dated June 3, 1954.

5. Letter from James G. Frame to Frank Moore, Jr. dated June 10, 1954.

Jury Trial

No request has been made by Plaintiff or Defendant for trial by jury.

The parties hereto agree to the foregoing Pre-Trial Order and the Court being fully advised in the premises:

Now Orders that the foregoing Pre-Trial Order shall not be amended except by consent by both parties, or to prevent manifest injustice; and

It Is Further Ordered that the Pre-Trial Order supercedes all pleadings; and

It Is Further Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact and law between Plaintiff and Defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 22nd day of January, 1958.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ C. E. WHEELOCK,
Of Attorneys for Plaintiff.

/s/ WM. C. RALSTON,
Of Attorneys for Defendant.

[Endorsed]: Filed January 22, 1958.

[Title of District Court and Cause.]

OPINION

Solomon, Judge:

I am of the opinion that the sum of $15,000.00 paid in settlement of the case brought by Ruth Buffington against Wm. V. Sherer, Frank Moore, Jr., and Tidewater Associated Oil Company was a reasonable sum and that the attorney fees charged and the expenses incurred in the defense of that action were likewise reasonable.

However, I am of the opinion that the "Exclusion of Product Liability" rider attached to the policy issued by Northwest Casualty Company to Wm. V. Sherer deprived him, as well as the other defendants named in the action brought by Ruth Buffington, of any coverage for the accident and injuries therein described.

I further find that Northwest Casualty Company was not obligated to defend the action, to settle it, or to pay any judgment that may have been rendered had the action not been settled.

Attorneys for the defendant shall prepare findings of fact, conclusions of law, and a judgment in accordance with this opinion.

[Endorsed]: Filed April 17. 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

I.

That the plaintiff is a citizen of the state of Delaware, and the defendant is a citizen of the state of Washington. That the amount in controversy, exclusive of interest and costs exceeds the amount of $3,000.00.

II.

That the plaintiff was licensed to and was carrying on a gasoline and oil distributing business within the state of Oregon and had entered into a "Distribution Consignment" contract with one William V. Sherer, of Bandon, Coos County, Oregon. That said contract was in full force and effect at all times herein mentioned.

III.

That the defendant was duly qualified to carry on a general insurance business in the State of Oregon and elsewhere.

IV.

That on or about the 9th day of January, 1953, the defendant executed and delivered to William V. Sherer, a "Comprehensive Public Liability" policy of insurance being No. 880-7277 with the plaintiff as an additional named insured. That said policy was in full force and effect on the 3rd day of December, 1953.

V.

That on the 1st day of December, 1953, one Ruth Buffington placed an order for stove oil with the said William V. Sherer and the plaintiff, and that a delivery was made.

VI.

That on the 3rd day of December, 1953, Ruth Buffington attempted to start a wood fire with the product delivered and that the same exploded, severely burning the said Ruth Buffington and also causing property damage.

VII.

That on September 12, 1955, Ruth Buffington served upon the plaintiff and others, a summons and complaint for the recovery of damages caused by the explosion hereinabove referred to, claiming negligence and violation of warranty.

VIII.

That the plaintiff, on January 25, 1956, tendered the defense of the said action brought by Ruth Buffington to the defendant. The defendant denied coverage under its policy and refused to defend.

IX.

That the defendant's policy of insurance hereinabove referred to, in part reads:

"Exclusion of Product Liability

Exclusions (A) and (B) below are applicable only when checked.

X (A) Bodily Injury

It is agreed that the policy does not apply to bodily injury, sickness or disease, including death at any time resulting therefrom.

X (B) Property Damage

It is agreed that the policy does not apply to injury to or destruction of property (including loss of use of such property), if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from the premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence (other than pick up and delivery, and the existence of tools, uninstalled equipment, and abandoned or unused material); provided, operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

Subject, otherwise, to all the terms and conditions of the policy.

Attached to and hereby made a part of policy No. ..... of the Northwest Casualty Company, of Seattle, Washington."

X.

The plaintiff was also insured by a policy of in-

surance executed and delivered by the Continental Casualty Company, who, through some loan agreement with the plaintiff, did employ counsel and settle said action brought against the plaintiff and others; the property damage claim and the claim of the defendant's husband for the sum of $15,000.00 and obtained releases. That attorney's fees and costs expended was the sum of $1010.73.

Conclusions of Law

Based upon the foregoing Findings of Fact, the Court concludes:

I.

That this court has jurisdiction over this cause and the respective parties.

II.

That under the "Comprehensive Public Liability" policy executed by the defendant, there was no obligation requiring the defendant to accept the defense for this plaintiff or any of the defendants in the case of Ruth Buffington vs. Tidewater Associated Oil Company, et al, nor to make any settlement or pay any judgment that might have been recovered in said action.

III.

That the settlement made and the attorney's fees and costs paid in the defense of the Plaintiff were reasonable charges and amounts.

IV.

That the defendant is entitled to judgment in its favor.

Made and entered this 29th day of April, 1958.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed April 29, 1958.

In The United States District Court
For The District of Oregon

Civil No. 9168

TIDEWATER ASSOCIATED OIL COMPANY, a Delaware corporation, Plaintiff,

vs.

NORTHWEST CASUALTY COMPANY, a Washington corporation, Defendant.

JUDGMENT

Based on the Findings of Fact and Conclusions of Law heretofore made and entered herein,

It Is Considered, Ordered and Adjudged that the complaint of the plaintiff be, and it is hereby dismissed, and that the defendant have and recover judgment against the plaintiff for costs and disbursements herein incurred, taxed at $20.00 and let execution issue therefor.

Dated this 29th day of April, 1958.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed April 29, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Tidewater Associated Oil Company, a Delaware corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 29th day of April, 1958.

WHEELOCK, RICHARDSON & NIEHAUS,
/s/ C. R. RICHARDSON,
Attorneys for Appellant, Tidewater Associated Oil Company.

[Endorsed]: Filed May 27, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will contend that the action as brought by Ruth Buffington, and known in this action as

the Buffington Case, is such an action to which plaintiff-appellant was afforded protection under the insuring agreements of the policy of insurance, being plaintiff's Exhibit Number 3, and that defendant-appellee breached said contract of insurance with plaintiff-appellant when it refused to defend said action known as the Buffington Case and to accept coverage thereunder, to plaintiff-appellant's damage as set forth in its Complaint.

Dated at Portland, Oregon, this 6th day of June, 1958.

WHEELOCK, RICHARDSON & NIEHAUS,

/s/ By C. R. RICHARDSON,

Of Attorneys for Plaintiff-Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 6, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Answer, Pre-trial Order, Opinion of Judge Solomon, Findings of Fact, Conclusions of Law, Judgment, Notice of Appeal, Undertaking for Cost

on Appeal, Designation of record on appeal with excerpt from Reporter's Transcript, attached, Order to forward exhibits, Defendant's Designation of record on appeal, and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9168, in which Tidewater Associated Oil Company, a Delaware corporation is the plaintiff and appellant, and Northwest Casualty Company, a Washington corporation, is the defendant and appellee; that said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there are enclosed herewith exhibits numbered 1 to 5, 9 & 10, inclusive.

I further certify that the cost of filing the notice of appeal $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 24th day of June, 1958.

[Seal] R. DeMOTT,
Clerk,
/s/ By MILDRED SPARGO,
Deputy.

[Endorsed]: No. 16072. United States Court of Appeals for the Ninth Circuit. Tidewater Associated Oil Company, a corporation, Appellant, vs. Northwest Casualty Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: June 25, 1958.
Docketed: July 3, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 16072

TIDEWATER ASSOCIATED OIL COMPANY, a Delaware Corporation, Appellant,

vs.

NORTHWEST CASUALTY COMPANY, a Washington Corporation, Appellee.

APPELLANT'S DESIGNATION OF THE RECORD TO BE PRINTED WITH STIPULATION OF COUNSEL FOR APPELLANT AND APPELLEE

Appellant hereby designates the matters referred to herein as the record to be printed and neces-

sary for consideration as follows:

(1) Complaint (together with Exhibits attached).

(2) Answer.

(3) Pre-Trial Order.

(4) Opinion of the Court.

(5) Findings of Fact and Conclusions of Law.

(6) Judgment.

(7) Statement of Points upon which Appellant intends to rely on appeal, as set forth in Appellant's Designation of Contents of Record on Appeal.

(8) This Designation of Parts of the Record.

/s/ C. R. RICHARDSON,
Of Attorneys for Appellant.

Stipulation

It Is Hereby Stipulated by and between counsel for appellant and counsel for appellee that the exhibits as set forth in Appellant's Designation of Contents of Record on Appeal and Appellee's Designation of Contents of Record on Appeal may be read in their original form; and

It Is Further Stipulated that at the time of the trial of the above-entitled cause in the United States District Court for the District of Oregon, that counsel for the respective parties stipulated that more than six months had elapsed since the tender of the cause of action known as the "Buffington Case" by plaintiff therein to defendant therein, being appellant and appellee herein respectively,

and that the Court, in the event of a judgment in favor of plaintiff, could set the attorneys' fees for plaintiff, the appellant herein, as to both causes of action in plaintiff-appellant's Complaint, in such sum as the court determined just and reasonable.

Dated at Portland, Oregon, this 2nd day of July, 1958.

/s/ C. R. RICHARDSON,
Of Attorneys for Appellant.

/s/ LEO LEVENSON,
Of Attorneys for Appellee.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 3, 1958. Paul P. O'Brien, Clerk.